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No.

In the Supreme Court

OF THE

United States

October Term 1986

IN RE: MANUEL L. REAL,
Chief Judge, United States
District Court, Central
District of California,

Petitioner

PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does an appellate panel have jurisdiction on remand to reassign a case to a different trial judge in the absence of any motion or grounds to disqualify the judge under 28 U.S.C. §§ 144 or 455?

2. Does the appellate panel's order to reassign this case to a different judge constitute an abuse of the purported power of reassignment in this case?

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No.

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October Term 1986

IN RE: MANUEL L. REAL,
Chief Judge, United States
District Court, Central
District of California,
Petitioner

PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Manuel L. Real, Chief Judge, United States District Court for the Central District of California, hereby petitions this Court to issue its writ of mandamus, or, in the alternative, its writ of prohibition to the United States Court of Appeals for the Ninth Circuit, ordering the court of appeals to vacate its order of March 25, 1986, reassigning the underlying case from petitioner to another district judge.

QUESTIONS PRESENTED

1. Does an appellate panel have jurisdiction on remand to reassign a case to a different trial judge in the absence of any motion or grounds to disqualify the judge under 28 U.S.C. §§ 144 or 455?

2. Does the appellate panel's order to reassign this case to a different judge constitute an abuse of the purported power of reassignment in this case?

PARTIES

Petitioner Manuel L. Real is the Chief Judge of the United States District Court for the Central District of California. The reassignment order was issued per curiam by a panel of Otto R. Skopil, Jr. and William C. Canby, Circuit Judges, United States Court of Appeals for the Ninth Judicial Circuit, and Gus J. Solomon, Senior Judge, United States District Court for the District of Oregon, sitting by designation. The parties to the underlying case are the United States of America, plaintiff, and Sears, Roebuck & Company, Inc., defendant. Each of the above-named persons and parties have been served with a true and correct copy of this petition.

REPORTED OPINIONS

The following opinions, listed in chronological order, have been officially reported in connection with the underlying criminal prosecution:

1. *United States v. Sears, Roebuck & Co.*, 647 F.2d 902 (9th Cir. 1981) (Sneed, Fletcher and Nelson, JJ.).

2. *United States v. Sears, Roebuck & Co.*, 518 F. Supp. 179 (C.D. Cal. 1981) (Real, J.).

3. *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386 (9th Cir. 1983) (Schroeder, Canby and Norris, JJ.).

4. *United States v. Sears, Roebuck & Co.*, 465 U.S. 1079, 104 S. Ct. 1441, 79 L. Ed. 2d 762 (1984) (denial of certiorari on the merits of defendant's prior appeal).

5. *United States v. Sears, Roebuck & Co.*, 785 F.2d 777 (9th Cir. 1986) (Skopil, Canby and Solomon, JJ.).

JURISDICTIONAL STATEMENT

The order reassigning the underlying action to a different judge was entered March 25, 1986, as part of a disposition on appeal in the underlying case, *United States v. Sears, Roebuck & Co.,* No. 84-5296 (9th Cir.). The defendant's petition for rehearing *en banc* was denied by the Court of Appeals on August 20, 1986, but the order was stayed on September 17, 1986, pending defendants' petition for certiorari. The Court has jurisdiction over this petition for mandamus pursuant to 28 U.S.C. § 1651(a) (the All Writs Act).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves the provisions of U.S. Constitution, art. II, § 4 and art. III, § 1, and the provisions of the Judicial Code, 28 U.S.C. §§ 137, 144, 332(a), 332(d), 455, 1651(a), and 2106, which are each set forth in the appendix.

STATEMENT OF THE CASE

In reassigning the underlying action to a different judge, the court below cited rulings by petitioner in the underlying action as evidence of an alleged "unwilling[ness] to preside in this case." The rulings concerned the indictment filed February 26, 1980, which charged defendant Sears, Roebuck & Co. ("Sears") with a conspiracy to defraud the Government (18 U.S.C. § 371), based on allegations that Sears violated 18 U.S.C. § 542 in failing to disclose manufacturers' rebates with respect to imported television receivers.

On June 1, 1981, Sears filed a motion to dismiss the indictment on grounds of prosecutorial misconduct.[1] Granting Sears' motion, petitioner, Hon. Manuel L. Real, found that the Justice Department attorney had abused the grand jury process by presenting inflammatory testimony on irrelevant matters. 518 F. Supp. 179 (C.D. Cal. 1981).

On appeal, the Ninth Circuit agreed that the prosecutor had engaged in abusive conduct but ordered the indictment reinstated. 719 F.2d at 1394 (9th Cir. 1983). Based on a *de novo* review, Judge Norris' lead opinion found that the grand jury had maintained its objectivity despite inflammatory presentations. *Id.* at 1389-93. Judge Norris also wrote a further opinion, "dissenting in part from the judgment," asserting that the district court should have inherent supervisory powers to dismiss the indictment, reviewable only for an abuse of discretion. *Id.* at 1394-95 and n.2.

Upon remand, Sears moved to dismiss the indictment based on the "supervisory powers" ground described in Judge Norris' opinion. A hearing was held on January 30, 1984. In response to the Government's argument that a "supervisory" dismissal should be granted only in an egregious case, Judge Real expressed his view that "this

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[1]A prior motion had been denied by the district court, Hon. Robert J. Kelleher, on October 31, 1980. Sears appealed, but the appeal was dismissed on the ground it was interlocutory. *United States v. Sears, Roebuck & Co.*, 647 F. 2d 902 (9th Cir. 1981). The case was reassigned to petitioner during the pendency of the appeal. Sears' subsequent motion to Judge Real presented additional facts not available to Judge Kelleher, and the Ninth Circuit expressly held that reconsideration was proper in light of the new evidence. *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1388 n. 1 (9th Cir. 1983), *cert. denied*, 465 U.S. 1079, 104 S. Ct. 1441, 79 L. Ed. 2d 762 (1984).

is one of the most egregious cases I have ever, ever known about in my career as a lawyer . . ."[2]

Prior to the hearing, the Government moved to dismiss the original indictment, having filed a superseding indictment on January 17, 1984. That superseding indictment now charged violations of the general "false statement" provision (18 U.S.C. § 1001), rather than the 18 U.S.C. § 542 charges found in the original indictment. The change was an effort by the Government to avoid the effects of *United States v. Teraoka*, a recent Ninth Circuit opinion that narrowly circumscribed the permissible scope of section 542.[3]

On February 29, 1984, Judge Real granted Sears' motion and dismissed the original indictment, pursuant to the court's supervisory powers. No. CR 80-183-R (C.D. Cal., Feb. 29, 1984). The Government then appealed and filed a motion to summarily reverse the dismissal, without briefing or argument. The identical panel from the previous appeal granted the motion, without opinion, and remanded the indictment for trial. No. 84-5091 (9th Cir. 1984).

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[2]Judge Real also remarked, "[I]f I had been United States Attorney at that time, I would have fired [the original prosecutor] on the spot." Reporter's Transcript, January 30, 1984, at 16. Last year, the same prosecutor, Mr. Paul Gorman, was convicted and imprisoned for conflict of interest, and for accepting a gratuity in connection with matters under investigation by a federal grand jury (18 U.S.C. §§ 201(g), 208). *United States v. Gorman*, No. CR 84-752 (N.D. Ohio, Apr. 22, 1985).

[3]In *United States v. Teraoka*, 669 F.2d 577, 579 (9th Cir. 1982), the Ninth Circuit held that 18 U.S.C. § 542 only proscribes false statements used to gain importation of merchandise, as distinguished from statements relevant only to the amount of any duty to be paid. The superseding indictment substituted charges under 18 U.S.C. § 1001, in place of the original allegations under section 542.

At the arraignment on the superseding indictment after remand, Sears moved to dismiss on the ground that the new charges under section 1001 broadened or amended the original charges under section 542, and were therefore barred by the statute of limitations. Following a hearing, Judge Real dismissed the indictment on October 3, 1984, holding that section 1001 charges did not relate back to the original indictment. No. CR 80-183 (A)R (C.D. Cal., Oct. 3, 1984).

The court below reversed on appeal, on the basis that section 1001 is included within section 542, and that the amended indictment therefore did not expand the scope of the original indictment. *United States v. Sears, Roebuck & Co.,* 785 F.2d 777 (9th Cir. 1986).

In remanding the case for further proceedings, *the court further directed that the case be assigned to a different judge.* 785 F.2d at 781. Relying on a line of appellate cases which purport to authorize reassignment where the original judge is deemed unable to disregard erroneous views, *id.* at 779-80, the panel reasoned that the criticisms of the prosecution's tactics "evidence an appearance of [Judge Real's] unwillingness to preside in this case." *Id.* at 781. Citing a threat to the court's docket from pretrial appeals, the panel concluded that reassignment was necessary to "preserv[e] the appearance of fairness." *Id.*

REASONS FOR GRANTING THE WRIT

I

THE COURT HAS JURISDICTION OVER THIS PETITION

The issues presented by this petition concern the asserted power of individual appellate panels to reassign cases from district judges, where such orders are unrelated to any motion to disqualify the judge (28 U.S.C.

§§ 144, 455) or any action by a judicial council pursuant to 28 U.S.C. § 332. The facts of this case involve the naked exercise of a purported appellate power to directly control the docket of a district judge. This Court's jurisdiction to entertain similar issues on mandamus was previously considered in *Chandler v. Judicial Council of the Tenth Circuit of the United States,* 398 U.S. 74, 90 S. Ct. 1648, 26 L. Ed. 2d 100 (1970).

The *Chandler* case is comparable to the matter at bench in that Judge Chandler's petition concerned circuit court action to divest the judge of matters on his calendar. 398 U.S. at 83. In that case, however, the challenged action was taken by the Judicial Council with respect to an entire category of cases. *Id.* at 81. Here, the reassignment order has been make in a particular case by an individual appellate panel, as an integral part of the disposition of an appeal.

This distinction is critical to the jurisdictional analysis. In *Chandler,* the majority expressly noted the difference between "administrative" determinations of a judicial council and "judicial" acts or decisions by an appellate *court.* 398 U.S. at 87. The Court stated:

> "The authority of this Court to issue a writ of prohibition or mandamus 'can be constitutionally exercised only insofar as such writs are in aid of its appellate jurisdiction . . . .' *If the challenged action of the Judicial Council was a judicial act or decision by a judicial tribunal, then perhaps it could be reviewed by this Court without doing violence to the constitutional requirement that such review be appellate . . . .*" *Id.* (emphasis added; citations omitted).

Mr. Justice Harlan's concurring opinion underscores this distinction. If the challenged orders constitute "an exercise of judicial power," the Supreme Court is vested

with appellate jurisdiction. 398 U.S. at 97. "Beyond cavil," Mr. Justice Harlan stated, "the issuance of a writ of mandamus to an inferior *court* is an exercise of appellate jurisdiction . . . ." *Id.*

As the judicial act of a judicial tribunal, the reassignment order at bench plainly constituted the exercise of an assumed judicial power. Mandamas is the appropriate remedy to challenge the appellate court's jurisdiction, as authorized by the All Writs Act, 28 U.S.C. § 1651(a). *Chandler v. Judicial Council of the Tenth Circuit of the United States,* 398 U.S. at 113 (Harlan, J., concurring). In *Ex Parte Peru,* 318 U.S. 578, 583, 63 S. Ct. 793, 87 L. Ed. 1014 (1951), the Court stated:

> "[T]he historic use of writs of prohibition and mandamus directed by an appellate to an inferior court has been to exert the revisory appellate power over the inferior court. The writs thus afford *an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction* . . ." (Emphasis added.)

This petition presents such a request to "confin[e] the inferior court to its prescribed jurisdiction . . . ." As set forth in Part II, *infra,* the reassignment order exceeds the court's jurisdiction and constitutes a judicial "usurpation of power." *Will v. United States,* 389 U.S. 90, 95, 88 S. Ct. 269, 19 L. Ed. 2d 305 (1967) (scope of mandamus).

Mandamus is also appropriate because the propriety of such reassignment orders will otherwise continue to evade review. Since the court below expressly declined to premise reassignment on the statutory grounds of disqualification (785 F. 2d at 780), the specific procedures applicable to disqualification orders do not apply. Moreover, the parties' right of appeal from a final judgment does not provide an adequate remedy since the conten-

tions of any future appellant will not necessarily preserve the issues presented by petitioner in the matter at bench.[4]

II

THE COURT OF APPEALS DID NOT HAVE JURISDICTION TO ORDER THE UNDERLYING CASE REASSIGNED TO A DIFFERENT JUDGE

The Ninth Circuit's reassignment order interdicts the district court's established procedures for the assignment of cases without constitutional or statutory authority. While creating numerous remedies for misconduct or neglect of duty by federal judges, neither the Constitution nor Congress has seen fit to provide a means by which an appellate panel may *replace* a district judge in a pending case *on the sole ground that the panel expects it will in the future be dissatisfied with the judge's discretionary determinations.* Such reassignments undermine the independence of the district courts, their proper relationship to the courts of appeal and "the mutual respect that necessarily and generally marks the relationship between federal trial and appellate courts." *Bauman v. United States District Court,* 557 F.2d 650, 653-54 (9th Cir. 1977) (citing the need for principled limitations on the use of appellate mandamus power).

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[4] "*[T]here seems to be no means by which [the affected judge's] challenge to the orders could be aired adequately on review of the cases to which they pertain.* While the losing party in a case assigned to another district judge might conceivably argue on appeal that he is entitled to reversal because his case should have been heard by [the original judge], such an argument would encounter a formidable obstacle .... More basically [the judge] is asserting an injury to himself, apart from any injuries to the parties in those cases; *the parties cannot be relied upon to seek vindication of that injury* ...." *Chandler v. Judicial Council of the Tenth Circuit of the United States,* 398 U.S. at 116 (Harlan, J., concurring) (emphasis added).

In attempting to find statutory authority, the court below relied on 28 U.S.C. § 1651(a) and 28 U.S.C. § 2106 as creating an implied power to reassign remanded cases. 785 F.2d at 779. However, neither statute can be stretched to provide the broad power assumed by the appellate court.

First, the authority to issue all writs necessary or appropriate in aid of jurisdiction, "agreeable to the usages and principles of law," 28 U.S.C. § 1651(a) (All Writs Act), does not expressly authorize appellate reassignment of cases in the district court.[5] Not only does a review of the traditional common law writs fail to disclose any source for an implied reassignment power, *see* G. Bell, *The Federal Appellate Courts and the All Writs Act,* 23 S.W.L.J. 858, 859 (1969), but the issuance of prerogative writs has been expressly limited to "exceptional circumstances amounting to a judicial 'usurpation of power' . . ." *Will v. United States,* 389 U.S. at 95 (mandamus vacated; record did not show that the district judge had defied the federal rules, but only that he may have erred on matters within his jurisdiction); *see, e.g., Banker's Life & Casualty Co. v. Holland,* 346 U.S. 379, 382, 74 S. Ct. 145, 98 L. Ed. 106 (1953) (mandamus does not issue to control the decision of the trial court, and does not "run the gauntlet" of reversible errors). While the court below is apparently dissatisfied with Judge Real's decisions on matters within his competence, the record does not demonstrate any refusal by Judge Real to be confined to a prescribed jurisdiction, or to exercise au-

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[5]In contrast to the Government's informal suggestion in this case for a different judge, the power to issue extraordinary writs under section 1651(a) is normally invoked only by a *petition,* to which the district judge is at least a nominal party. F.R.A.P. §21(b); *Kerr v. United States District Court,* 426 U.S. 394, 402, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976).

thority when required to do so. *See Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, 26, 63 S. Ct. 938, 67 L. Ed. 1185 (1943); *see also, Bauman v. United States District Court,* 557 F.2d at 653-54 (without limitations on use of extraordinary writs, appellate courts would be tempted to grant relief because they are sympathetic with the petitioner's underlying action, or question the trial court's ability to direct the litigation).

Second, the appellate court's power to order "such further proceedings . . . as may be just under the circumstances," 28 U.S.C. § 2106, does not expressly include the power to order *before whom* such proceedings are to be had. Of the decisions citing section 2106 for the contrary proposition, none of them elaborate any reasoning for this novel extension of the mandate powers. *See, e.g., Tanner Livery Ltd. v. Avis, Inc.,* 316 F.2d 804, 811 (9th Cir. 1963), *cert. denied,* 375 U.S. 821, 84 S. Ct. 59, 11 L. Ed. 55 (1963) (citation of 28 U.S.C. § 2106, without discussion). While one commentator has noted that the appellate mandate must be "the most delicate exercise[ ]" of judicial power, G. Bell, *Appellate Court Opinion and the Remand Process,* 2 Ga. L. Rev. 526, 537 (1968), an order reassigning a case to a different judge operates as an appellate blunderbuss. The only logical purpose or effect of such orders is to influence the *future* exercises of discretion which the appellate court lacks any proper power to control. *See Banker's Life & Casualty Co. v. Holland,* 346 U.S. at 382; *see also,* ABA, Commission on Standards of Judicial Administration, Standards Relating to Appellate Courts, § 3.11 at 19 (1977) ("[a]ppropriate respect should be given the trial court's exercise of discretionary authority").

Although sections 1651(a) and 2106 do not provide the reassignment power here assumed by the court below,[6] three specific mechanisms have been provided for the partial or complete removal of a district judge in cases of actual misconduct, or willful disregard of superior authority. First, the only method sanctioned by the Constitution for the removal of a judge from his office is the constitutional process of impeachment. U.S. Const., art. II, § 4, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58-61, 102 S. Ct. 2858, 73 L. Ed. 598 (1982).

Second, if a judge has a personal bias, prejudice or interest in a particular case, a litigant may move to disqualify the judge in that case pursuant to 28 U.S.C. §§ 144, 455. Such motions must be supported by evidence, and the district court's denial of the motion is reviewable only for an "abuse of discretion." *See, e.g., Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1166 (5th Cir. 1982), *reh'g denied*, 697 F.2d 1092, *cert. denied*, 464 U.S. 814, 104 S. Ct. 69, 78 L. Ed. 2d 83 (1983).

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[6]In addition to the purported statutory grounds, the court below relied on the body of circuit court cases that have arisen to give such reassignments the appearance of legal authority. However, none of the cases provide the needed "link" between the general terms of sections 1651(a), 2106, and the specific alleged reassignment power. In a few of the earlier cases, *e.g.*, *Naples v. United States*, 307 F.2d 618, 631 n.43 (D.C. Cir. 1962) (*en banc*), the courts cited *Calvaresi v. United States*, 348 U.S. 961, 75 S. Ct. 522, 99 L. Ed. 749 (1955), as authority for a *non*-statutory inherent power, but the reliance on *Calvaresi* is misplaced. While the brief *per curiam* order may seem at first blush to support the theory, the case involved denials of *motions to disqualify* the district judge under 28 U.S.C. § 144. *Calvaresi v. United States*, 216 F.2d 891, 900 (10th Cir. 1954). Accordingly, the case did not present issues of reassignment *apart from* the statutory procedure of disqualification.

Third, the most flexible method of control over the district court's docket vests that power only within the judicial councils of the circuits, not individual appellate panels. Under 28 U.S.C. § 137, the judicial council may make necessary orders for the division of business in the district court, provided the district judges are themselves unable to agree. The judicial council is further authorized to make "necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." 28 U.S.C. § 332(d)(1). In the case of a judge who has an accumulation of submitted cases, it is the judicial council that may order him not to take on any further trial work, *Chandler v. Judicial Council of the Tenth Circuit of the United States*, 398 U.S. at 121 (Harlan, J., concurring) (citing legislative history), and the councils may also address " 'any other matter which . . . could be made the subject of criticism for which [a district judge] may be responsible.' " *Id.* at 124 (legislative testimony of Chief Justice Groner).[7]

In contrast to these existing procedures, the allegedly "inherent" power to reassign cases vests individual appellate panels with direct power over a district judge's docket. The individual panels may purportedly exercise this assumed power based solely on their own factual findings concerning the judge, without notice or any opportunity to be heard. Unlike conventional exercises of appellate jurisdiction, such reassignment orders are *prospective* in nature, with the sole effect to substitute a new

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[7]Importantly, the statute contemplates notice to the affected judge prior to any administrative remedy, and an opportunity to be heard with respect thereto. *Id.* at 128 (Harlan, J., concurring); *see also In re Charge of Judicial Misconduct*, 593 F.2d 879, 880 n.* (9th Cir. 1979) (applicable Ninth Circuit procedures); *but see Chandler v. Judicial Council of the Tenth Circuit of the United States*, 398 U.S. at 136 (Douglas J., dissenting) (warning that administrative disqualifications may amount to "*pro tanto*" impeachment).

judge's discretion in those areas the appellate court lacks any proper power to control. *See, e.g., Icicle Seafoods, Inc. v. Worthington*, ____ U.S. ____, 106 S. Ct. 1527, 89 L. Ed. 2d 739 (1986) (requirement of deference to original finder of fact).

As is apparent from the facts of this case, *see* Section III, *infra*, appellate panels may be tempted to order reassignment merely because they believe a different judge would be more likely to produce agreeable results. Such consequences fly in the face of the constitutional guarantee of life-tenured, independent judges at all levels of the federal judiciary, U.S. Const., art. III, § 1; *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. at 58-61, and the "*imperative* need for total and absolute independence of judges . . . in any phase of the decisional function." *Chandler v. Judicial Council of the Tenth Circuit of the United States*, 398 U.S. at 85. This Court should therefore issue its writ of mandate to vacate the appellate court's reassignment order.

III

THE PURPORTED POWER OF REASSIGNMENT WAS ABUSED IN THIS CASE

Although the court below is apparently unhappy with Judge Real's orders to dismiss the indictment and the superseding indictment, a review of the record confirms that he has acted within his jurisdiction at every juncture. In the absence of any evidence that Judge Real would persist in any error, the reassignment appears simply to be an abuse of power by the appellate panel. Upon review of the record, this Court's writ of mandamus should issue to vacate the reassignment.

A. The Comments From The Bench, Cited By The Court Of Appeals, Do Not Justify The Inference That Judge Real Is "Unwilling To Preside"

Relying on transcripts of two hearings, the court below drew the explicit conclusion that Judge Real appears to be "unwilling [ ] to preside in this case." 785 F.2d at 781. However, none of the quoted statements justifies such a harsh judgment. Indeed, Judge Real's statements all stem from the same misconduct which the Ninth Circuit also found "abusive," reflecting "excessive prosecutorial zeal." 719 F.2d at 1389-90 (9th Cir. 1983). Unless criticism of prosecution tactics is *per se* disqualifying, the record set forth below does not disclose any ground for the precipitous reaction by the appellate panel.

At the hearing on January 30, 1984, Judge Real responded to a prosecution argument that the case was not so "egregious" as to justify the exercise of a supervisory power. Judge Real replied that the case *was* egregious, and that the prosecutor should have been subjected to discipline.[8] Later, Judge Real replied to the novel theory that corporations do not have the constitutional right to be indicted on certain crimes before a grand jury, reasoning that, since the Government avoided any test of that theory, Sears was entitled to the same rights in the grand

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[8] "MR. HOFFMAN: [Y]ou're talking about a case that is so egregious that the conduct simply could not be condoned by a court. This is not such a case.

* * *

THE COURT: You know, Mr. Hoffman, I think this is one of the most egregious cases I have ever, ever known about in my career as a lawyer. I think Mr. Gorman — if I had been United States Attorney at that time, I would have fired him on the spot." Reporter's Transcript, January 30, 1984, at 15-16.

jury room as any other defendant.[9] When the prosecutor asserted that the prior judicial criticism was sufficient admonishment, Judge Real questioned whether the published opinion had any true impact.[10]

At the next hearing, on February 27, 1984, the Government requested an arraignment based on the superseding indictment, which had been obtained in light of the *Teraoka* case, decided in May, 1982. Judge Real's stated perception that the Government had been dilatory in filing the new indictment[11] was not allayed by the expla-

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[9]"MR. HOFFMAN: Well, there's no prejudice here to Sears Roebuck, Your Honor. I think that is clear because they don't even have a constitutional right to be indicted. We stated that before and with respect to the cases —

THE COURT: But you hid behind that procedure. Didn't want to take it — didn't want to bite the bullet and they are entitled to all of the rights that anybody who takes that procedure is entitled to, Mr. Hoffman." *Id.* at 18.

[10]"MR. HOFFMAN: [I] think any objective reading of this Court's opinion that was issued in 1981 would conclude Mr. Gorman has been publicly chastised by this Court. Therefore —

THE COURT: Obviously the Department of Justice didn't listen to it; didn't read it as such.

• • •

MR. HOFFMAN: I don't think that anybody walked out of this courtroom not thinking that —

THE COURT: To put him on other cases after that.

• • •

MR. HOFFMAN: But I would not say that the thing was totally ignored by the Department of Justice. I think that is an unfair charge." *Id.* at 20-21.

[11]"MR. HOFFMAN: [W]e have also again advised the Court that we don't intend to proceed to trial on the original indictment because of the [*Teraoka*] decision . . . .

nation that the strategy had been to wait for the defendant to raise the *Teraoka* issue.[12]

Although excerpts of Judge Real's remarks were cited by the court below, the opinion does not consider them in the context presented here. It is fair to say that Judge Real has often been critical, but there is a vast chasm between criticism and the perceived "unwillingness to preside." If frequent criticism of one or another party were sufficient grounds for reassignment, a multitude of

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THE COURT: That's been pending for a long time, Mr. Hoffman, and you did not take the courtesy even to tell the Court that you were even considering . . . reindictment.

MR. HOFFMAN: I don't think that that is required, Your Honor.

THE COURT: I know it isn't required, but it is common courtesy to at least tell the Court what you are doing so that I don't have to spend my time in terms of doing things that are totally, totally irrelevant to what is going on. I think the conduct, Mr. Hoffman, of the government in this case has been outrageous from the beginning and it has not ceased. It has not ceased." Reporter's Transcript, February 27, 1984, at 8.

[12]"MR. HOFFMAN: *[I] think the situation concerning the Teraoka decision falls as much on Sears' shoulders as it does on the United States.* We — I personally made available the Government's position concerning *Teraoka* as it applied to this case to [defense counsel]. When — if anything I believe Sears was the party that was playing the chess game with the Court. And when it came before you on January 9 —

• • •

THE COURT: They addressed the indictment that was before the Court at that time. Now, what game were they playing?

MR. HOFFMAN: They could have moved to dismiss that indictment based on the *Teraoka* decision. *That is what the Government expected would occur based on my conversations with them.*" *Id.* at 9-10 (emphasis added).

such orders might be issued throughout the judiciary — yet nothing more has been shown in this case.

B. The Appellate History Of the Case Does Not Disclose Any Threat To the Orderly Administration Of Justice

In addition to the quoted remarks, the Court of Appeals cited a threat to its docket from the series of pretrial appeals. 785 F.2d at 781. Implicit in the opinion is the view that Judge Real has not been giving due regard for the appellate court's desire to move the case to trial. *However, each of the three dismissals involved a different issue, as to which Judge Real was entitled to make the initial determination.* Although the appellate court has not agreed with Judge Real's decision, it cannot conclude that they were unreasonable, capricious or unjudicial in any sense of the word.

With respect to the original indictment, the issues concerned the prosecutorial misconduct in the presentation of the case to the grand jury. Although the Ninth Circuit reversed Judge Real's first dismissal, there was no implied suggestion that Judge Real had incorrectly perceived the impropriety before the grand jury. To the contrary, Judge Norris' lead opinion was punctuated by repeated expressions of agreement with Judge Real's condemnation of the misconduct. 719 F.2d at 1389-90.

While his lead opinion observed that a majority of the panel had voted to reinstate the indictment, Judge Norris added his view that the district court should have the opportunity to dismiss the indictment on supervisory power grounds. 719 F.2d at 1394 n.14. The separate opinion, "dissenting in part from the judgment," distinguished a *de novo* review of Sears' constitutional challenge *versus* an "abuse of discretion" review of a supervisory dismissal. *Id.* at 1395 n.2.

The unusual circumstance of Judge Norris' two opinions led directly to the second appeal. While the "supervisory powers" basis for dismissal was described only in the separate opinion, nothing in Judge Norris' "majority" opinion contradicts his "dissenting" opinion in any way. Taken together, the two opinions imply that the panel had not reached the separate issue of "supervisory" dismissal.

When Sears brought a motion to dismiss on the alternate ground, Judge Real expressly applied the factors outlined by Judge Norris. *United States v. Sears, Roebuck & Co.*, CR 80-183-R (C. D. Cal., Oct. 3, 1984). Thereafter, the same appellate panel (Schroeder, Canby and Norris, JJ.) granted the Government's motion for summary reversal. *United States v. Sears, Roebuck & Co.*, 84-5091 (9th Cir. 1984). While it now appears in hindsight that none of the judges expected Judge Real to entertain a "supervisory powers" motion, the circumstances of the prior opinion were such that Judge Real reasonably regarded the issue as having been left open.[13]

After the second appeal, the Government decided to proceed with the *superseding* indictment, to which Sears raised the statute of limitations as a defense. Applying the rule that a superseding indictment may be untimely if it "broadens or amends" the original indictment, *United States v. Grady*, 544 F.2d 598, 602 (2d Cir. 1976), Judge Real dismissed the new indictment under section 1001,

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[13]The appellate mandate did not in any event extend to factual or legal issues that had neither been considered in the district court nor expressly presented to the Court of Appeals. *Quern v. Jordan*, 440 U.S. 332, 348, n.18, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979); *Chapman v. National Aeronautics & Space Administration*, 736 F.2d 238, 241-42 (5th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S. Ct. 517, 83 L. Ed. 2d 406 (1984) (law of the case doctrine did not preclude factual findings on issue not actually presented in prior appeal, despite contrary intimations in prior opinion).

because the charges in the original indictment were based only on section 542. This ruling followed *United States v. Teraoka*, 669 F.2d at 579, where the Ninth Circuit held that false statements concerning import assessments may violate section 1001, but are not chargeable under section 542.

In *Teraoka*, the court distinguished a prior Ninth Circuit case, *United States v. Rose*, 570 F.2d 1358, 1363 (9th Cir. 1978). Although *Rose* held that section 1001 did not involve proof of any additional element in a case where section 542 was applicable, *Teraoka* rejected any inference that section 542 would always apply to conduct chargeable under section 1001. *Teraoka v. United States*, 669 F.2d at 579, n.3. Far from holding that section 1001 is *included* under section 542 in a case charging a failure to pay an import assessment, the *Teraoka* court dismissed the indictment on the ground that the charge under section 542 was not applicable, and that the indictment failed to charge section 1001.

Citing *United States v. Rose* for the proposition that section 1001 is included under section 542 in this case, the court below simply ignored the *Teraoka* holding that section 542 *does not apply* to a defendant's alleged failure to report the true price of imported goods. It would be a feat of legerdemain to conclude that substituting section 1001 for section 542 "did not expand or broaden the charges," 785 F.2d at 779, without implicitly rejecting *Teraoka's* view that the original charge under section 542 had been too narrow to reach the conduct alleged. In light of an apparent intra-circuit conflict, Judge Real certainly cannot be faulted for following *Teraoka* as the then-controlling authority, nor should his decision be a compelling reason to assign this case to another judge.

C. Upon Review Of The Record, The Decision To Take The Case From Judge Real's Docket Lacked Any Substantial Basis

In ordering reassignment to a different judge, the court below purported to apply various factors for its decision, including whether the original judge was "adamant" in making erroneous rulings, or whether he would have difficulty excluding views based on inadmissible evidence.[14] However, the review of the record set forth above disproves the apparent implication that Judge Real has refused to follow the law or the evidence. Thus, nothing in the history of this case can be used to predict that Judge Real will fail to follow the law or evidence in future determinations.

While the subtext of the opinion below conveys an emotion of exasperation with the course of the litigation, many examples could be found of cases involving multiple appellate proceedings, without any perceived necessity to replace the trial judge. *In the absence of any basis to find that Judge Real has persisted, or is likely to persist, in any legal or factual error, the reassignment is simply the naked exercise of an uncontrolled power under which the appellate panel has concluded that the prosecution should have a better judge, and that a new judge will therefore be appointed.* Not only does such an action constitute an unjustified public rebuke, but it amounts to an unprecedented appellate interference with the proper functioning of the district court.

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[14] *United States v. Sears, Roebuck & Co.*, 785 F.2d at 780, *citing with approval United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (*en banc*); *United States v. Doe*, 655 F.2d 920, 929 (9th Cir. 1981). The purported three-part test for reassignment was cut from whole cloth in the *Robin* case, primarily for use in cases being remanded for *resentencing*. 553 F.2d at 10-11.

IV

CONCLUSION

For the reasons stated, this Court's writ of mandamus should issue as prayed, directing the United States Court of Appeals for the Ninth Circuit to vacate its order of March 25, 1986, reassigning the underlying litigation to a different judge.

Dated: October 16, 1986

Respectfully submitted,
JOSEPH A. BALL
DONALD C. SMALTZ
LEIGHTON M. ANDERSON

By DONALD C. SMALTZ
Attorneys for Petitioner

APPENDIX

U.S. Const. art. II, § 4:

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

U. S. Const. art. III, § 1:

The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

28 U.S.C. § 137:

> The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.
>
> The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.
>
> If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

28 U.S.C. § 144:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 332:

> (a)(1) The chief judge of each judicial circuit shall call, at least twice in each year and at such places as he may designate, a meeting of the judicial council of the circuit, consisting of —
>
> (A) the chief judge of the circuit, who shall preside;
>
> (B) that number of circuit judges fixed by majority vote of all such judges in regular active service; and
>
> (C) that number of district judges of the circuit fixed by majority vote of all circuit judges in regular active service, except that —
>
> (i) if the number of circuit judges fixed in accordance with subparagraph (B) of this paragraph is less than six, the number of district

judges fixed in accordance with this subparagraph shall be no less than two; and

(ii) if the number of circuit judges fixed in accordance with subparagraph (B) of this paragraph is six or more, the number of district judges fixed in accordance with this subparagraph shall be no less than three.

(2) Members of the council shall serve for terms established by a majority vote of all judges of the circuit in regular active service.

(3) The number of circuit and district judges fixed in accordance with paragraphs (1)(B) and (1)(C) of this subsection shall be set by order of the court of appeals for the circuit no less than six months prior to a scheduled meeting of the council so constituted.

(4) Only circuit and district judges in regular active service shall serve as members of the council.

(5) No more than one district judge from any one district shall serve simultaneously on the council, unless at least one district judge from each district within the circuit is already serving as a member of the council.

(6) In the event of the death, resignation, retirement, or disability of a member of the council, a replacement member shall be designated to serve the remainder of the unexpired term by the chief judge of the circuit.

(7) Each member of the council shall attend each council meeting unless excused by the chief judge of the circuit.

• • •

(d) (1) Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit. Each council is authorized to hold hearings, to take sworn testimony, and to issue subpoenas and subpoenas duces tecum. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the court of appeals, at the direction of the chief judge of the circuit or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas duces tecum issued on behalf of the United States or an officer or agency thereof.

(2) All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council.

(3) Unless an impediment to the administration of justice is involved, regular business of the courts need not be referred to the council.

• • •

28 U.S.C. § 455:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceedings in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the per-

sonal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the

outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. § 1651(a):

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 2106:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

UNITED STATES of America,
Plaintiff-Appellant,

v.

SEARS, ROEBUCK & COMPANY, INC.,
Defendant-Appellee.

No.84-5296.

United States Court of Appeals,
Ninth Circuit

Argued and Submitted Aug. 5, 1985.

Decided March 25, 1986.

The United States District Court for the Central District of California, Manuel L. Real, Chief Judge, dismissed superseding indictment on the ground that it broadened original indictment and was therefore barred by five-year statute of limitations. The Government appealed. The Court of Appeals held that: (1) charges contained in superseding indictment did not broaden original indictment and therefore it was not barred by limitations, and (2) appearance of justice and orderly administration of Court of Appeals' appellate docket would best be served by remand to another judge.

Reversed and remanded with instructions.

1. Criminal Law — 160

Once an indictment is returned, statute of limitations is tolled as to charges contained in indictment.

2. Indictment and Information — 15(1)

A superseding indictment returned while first indictment is pending is timely unless it broadens or substantially amends charges in original indictment.

3. Criminal Law — 160

Substitution in superseding indictment of general false statement provision contained in 18 U.S.C.A. § 1001 for more specific false statement provision in statute [18 U.S.C.A. § 542] governing entry of goods by means of false statements did not expand or broaden charges against defendants since all elements of 18 U.S.C.A. § 1001 prosecution were included in the 18 U.S.C.A. § 542 charge; therefore, superseding indictment was not barred by limitations 18 U.S.C.A. § 3282.

4. Criminal Law — 160

Addition of reference to dumping duties in indictment alleging making of false statements in any matter within jurisdiction of any department or agency of United States did not constitute a substantial change in superseding indictment, and thus, superseding indictment was not barred by limitations. 18 U.S.C.A. §§ 1001, 3282.

5. Criminal Law — 160

Potential for imposition of greater penalty because superseding indictment charged substantive violations of 18 U.S.C.A. § 1001 governing use of false statements in any matter within jurisdiction of department or agency of United States did not render charges in superseding indictment broader than those in original indictment, which charged violations of 18 U.S.C.A. § 542 governing entry of goods by means of false statements, and therefore, subsequent indictment was not barred by limitations. 18 U.S.C.A. § 3282.

6. Criminal Law — 1181.5(1)

In the absence of proof of personal bias, criminal case is remanded to a different judge only under unusual circumstances.

7. Criminal Law — 1181.5(1)

In making determination as to whether criminal case should be remanded to different judge, Court of Appeals considers whether original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, whether reassignment is advisable to preserve appearance of justice, and whether reassignment would entail waste and duplication out of proportion to any gain in preserving appearance of fairness with first the two factors being of equal importance and finding of one of them supporting remand to different judge.

8. Criminal Law — 1181.5(1)

A district judge's adamance in making erroneous rulings may justify remanding criminal case to a different judge.

9. Criminal Law — 1181.5(1)

Appearance of justice and orderly administration of Court of Appeals' appellate docket would best be served by remand of criminal case to another judge.

Victor D. Stone, Atty., Dept. of Justice, Washington, D.C., for plaintiff-appellant.

Stephen D. Miller, Miller & Nolan, Inc., Beverly Hills, Cal., for defendant-appellee.

Appeal from the United States District Court for the Central District of California.

Before SKOPIL and CANBY, Circuit Judges, and SOLOMON,* District Judge.

PER CURIAM:

The government appeals the dismissal of the superseding indictment on the ground that it broadened the original indictment and was therefore barred by the five year statute of limitations contained in 18 U.S.C. § 3282. We reserve and remand this case for assignment to a different judge.

I.

[1, 2] Once an indictment is returned the statute of limitations is tolled as to the charges contained in the indictment. *United States v. Wilsey,* 458 F.2d 11, 12 (9th Cir. 1972). A superseding indictment returned while the first indictment is pending is timely unless it "broaden[s] or substantially amend[s]" the charges in the original indictment. *United States v. Grady,* 544 F.2d 598, 602 (2d Cir. 1976). *See also United States v. Friedman,* 649 F.2d 199, 203-04 (3d Cir.1981); *United States v. Charnay,* 537 F.2d 341, 354 (9th Cir.), *cert. denied,* 429 U.S. 1000, 97 S.Ct. 527, 50 L.Ed.2d 610 (1976). To determine whether the superseding indictment impermissibly changed the charges in the original indictment it is necessary to examine the two indictments carefully. *Charnay,* 537 F.2d at 354; *see also Mende v. United States,* 282 F.2d 881, 883 (9th Cir.1960), *cert. denied,* 364 U.S. 933, 81 S.Ct. 379, 5 L.Ed.2d 365 (1961).

[3] The original indictment charges twelve substantive violations of 18 U.S.C. § 542, while the superseding indictment charged, based on the same conduct, twelve substan-

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

tive violations of 18 U.S.C. § 1001. The original indictment also charged a conspiracy to violate 18 U.S.C. § 542 and to defraud the United States by impairing the customs service's attempt to learn the price and duties to be collected on imported television receivers. The conspiracy charged in the superseding indictment deleted all references to violations of 18 U.S.C. § 542. In other respects the conspiracy charge substantially resembled that charged in the original indictment with the exception of an additional parenthetical reference to dumping duties.

[4] The substitution of the general false statement provision in 18 U.S.C. § 1001 for the more specific false statement provision in 18 U.S.C. § 542 did not expand or broaden the charges against Sears, since all the elements of a section 1001 prosecution are included in a section 542 charge. *United States v. Rose*, 570 F.2d 1358, 1363 (9th Cir.1978). Nor did the addition of a reference to dumping duties constitute a substantial change in the superseding indictment. *See Friedman*, 649 F.2d at 204 (factual allegations in a superseding indictment did not change although some additional details were added). The government from the outset made Sears aware of its concern with alleged attempts by Sears to circumvent these duties. *See United States v. Sears*, 719 F.2d 1386, 1388 (9th Cir.1983) (in a previous appeal, this court noted that a possible motive for Sears' alleged false statements was "to avoid dumping duties. . . ."), *cert. denied*, 465 U.S. 1079, 104 S.Ct. 1441, 79 L.Ed.2d 762 (1984).

[5] Finally, the potential for imposition of a greater penalty under section 1001 does not render the charges in the superseding indictment broader than those in the original indictment. *Cf. United States v. Banks*, 682 F.2d 841, 845 (9th Cir.1982) (a superseding indictment that

provided a potentially higher penalty than the original indictment was upheld), *cert. denied*, 459 U.S. 1117, 103 S.Ct. 755, 74 L.Ed.2d 972 (1983); *accord United States v. Brooklier*, 685 F.2d 1208, 1215-16 (9th Cir.1982), *cert. denied*, 459 U.S. 1206, 103 S.Ct. 1194, 75 L.Ed.2d 439 (1983).

II.

The All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). In addition,

> [t]he Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106.

These statutes, as well as the court's inherent authority, allow it to direct that a case on remand be assigned to a different judge. *Sederquist v. City of Tiburon*, 765 F.2d 756, 763 (9th Cir.1984); *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804 (9th Cir.), *cert. denied*, 375 U.S. 821, 84 S.Ct. 59, 11 L.Ed.2d 55 (1963) (28 U.S.C. § 2106); *United States v. Ritter*, 273 F.2d 30 (10th Cir.1959), *cert. denied*, 362 U.S. 950, 80 S.Ct. 863, 4 L.Ed.2d 869 (1960) (inherent authority and All Writs Act); *see generally Barber v. United States,* 711 F.2d 128 (9th Cir. 1983).

Ordinarily, further proceedings in a case remanded to the district judge are conducted by the judge who origi-

nally tried the case. But, on rare occasions, both for the judge's sake and the appearance of justice, an assignment to a different judge is desirable. The remand does not imply any personal grievance against the judge.

[6-8] In the absence of proof of personal bias, we remand to a new judge only under "unusual circumstances." *United States v. Arnett,* 628 F.2d 1162, 1165 (9th Cir. 1979) (quoting *United States v. Robin,* 553 F.2d 8, 10 (2d Cir. 1977) (*en banc*)). In making this determination we consider

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Arnett, 628 F.2d at 1165 (quoting *United States v. Robin,* 553 F.2d at 10). The first two of these factors are of equal importance, and a finding of one of them would support a remand to a different judge. *See United States v. Alverson,* 666 F.2d 341, 349 (9th Cir. 1982). A district judge's adamance in making erroneous rulings may justify remand to a different judge. *See United States v. Doe,* 655 F.2d 920, 929 (9th Cir. 1981). *See also United States v. Larios,* 640 F.2d 938, 943 (9th Cir. 1981) (remand for resentencing before different judge where original judge had unreasonably refused to wait for transcript of former proceedings before sentencing and was adamant in his belief as to defendant's culpability; he therefore could not reasonably be expected to ignore his conclusions and the appearance of fairness required reassignment); *United States v. Ferguson,* 624 F.2d 81 (9th Cir. 1980) (remand

to new judge where original judge created error by refusing to consider mitigating factors before sentencing, where refusal to consider those factors was inconsistent with the need to preserve the appearance of justice and where reassignment would mean little duplication of efforts); *United States v. Arnett,* 628 F.2d at 1165 (declining to remand to a new judge where no injustice was threatened and reassignment would have caused considerable waste of time and duplication of effort).

There is no suggestion in any of the case law that the district court as an institution must first be given the opportunity to consider whether to reassign a case. If the request for reassignment after remand were made of the district judge by a party on bias grounds, the judge's refusal would be directly reviewable in this court by mandamus petition.

Nor do we believe that the statutory provisions concerning disqualification of judges, 28 U.S.C. §§ 144, 455 (1982), pose an obstacle to this court's ordering reassignment on remand. The disqualification statutes provide a method whereby a party to an action may request a judge to disqualify himself on the grounds of bias. *Id.* Our situation is distinguishable. We are not acting under the disqualification statutes, which a party must first invoke before the district court. Instead, this court is being asked in the first instance to exercise its inherent power to administer the system of appeals and remands by ordering a case reassigned on remand. The basis for the reassignment is not actual bias on the part of the judge, but rather a belief that the healthy administration of the judicial and appellate processes, as well as the appearance of justice, will best be served by such reassignment. We do not believe that the statutory provisions concerning disqualification are either exhaustive or the exclusive method whereby a judge may be removed from hearing a

case. As the Second Circuit decision in *United States v. Robin* indicates, the appellate court's authority to reassign exists apart from the judicial disqualification statutes. *See* 553 F.2d at 11. There is simply nothing in the disqualification statutes to prohibit this court from taking appropriate action in the first instance.

[9] We believe the appearance of justice and the orderly administration of this court's appellate docket would best be served by remand to another judge. This is the fourth pretrial appeal in this case; and the third time the government has appealed from dismissal of the indictment. Even before trial, this case has consumed a tremendous amount of this court's judicial resources and time. This court's orderly administration of its own docket is threatened by the exertion of effort and the expenditure of time on repeated pretrial appeals in one case.

The district judge has been adament [sic] in his rulings. The district judge has twice dismissed the original indictment emphatically condemning the conduct of the government and the prosecuting attorney. At a hearing before the district court, following this court's reversal of that court's first dismissal, the district court stated that:

> I think this is one of the most egregious cases I have ever, ever known about in my career as a lawyer. I think . . . if I had been the United States Attorney at that time, I would have fired [the original prosecutor] on the spot . . . .
>
> The government hid behind that [grand jury] procedure . . . didn't want to bite the bullet . . . .
>
> Obviously the Department of Justice didn't listen to [my prior opinion dismissing this case]; didn't read it as such . . . to put [the original prosecutor] on other cases after that.

(Government's Br. at p. 44). The district court then dismissed this indictment a second time. The second dismissal, which followed a remand from this court directing reinstatement of the indictment, was summarily reversed. The district judge then dismissed this matter for a third time concluding, without making any findings, that the superseding indictment was time-barred. In so ruling, the district judge renewed his condemnation of the government stating "[t]he conduct . . . of the government in this case has been outrageous from the beginning and it has not ceased. It has not ceased." (Govt.Br. at 10). The district judge's statements and conduct evidence an appearance of his unwillingness to preside in this case.

Remand of this case, like those cases remanded to a new sentencing judge, would entail minimal duplication of effort and waste. *See Doe,* 655 F.2d at 929; *Ferguson,* 624 F.2d at 84. The superseding indictment in this case was returned before the defendant was ever tried on the first indictment. While the district judge's acquaintance with pretrial matters might expedite the trial on the superseding indictment, any duplication of time would not be so great as to be "out of proportion to any gain in preserving the appearance of fairness." *Arnett,* 628 F.2d at 1165 (quoting *United States v. Robin,* 553 F.2d at 10).

REVERSED and REMANDED with instructions that this case be reassigned on remand.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 16, 1986, I served the within Petition for a Writ of Mandamus in re: "Manuel L. Real, Chief Judge, U.S. District Court", in the U.S. Supreme Court, October Term 1986;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 16, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA
(N)